IN THE

Supreme Court of the United States

FILIP YASA,

Petitioner,

AGAINST

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service of New York,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Petitioner prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming an order of the District Court for the Southern District of New York, dismissing a Petition for a Writ of Hbeas Corpus.

Jurisdiction

The order of the Court of Appeals was rendered and entered on June 7, 1960. The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U. S. C. and Section 1 (b) of Rule 19 of the Revised Rules of this Court as amended.

Statement of Matter Involved

The petitioner is an alien who is a native and citizen of Yugoslavia. He arrived in the United States as a seaman and since the date of his last entry he has continuously

resided in this Country, being unable to obtain shipping employment upon any vessel.

That after an order of deportation was issued, the Plaintiff made an application for a stay of deportation pursuant to Section 243 (H) of the Immigration and Nationality Act of 1952, as amended (66 Stat. 212, 8 U. S. C. Section 1253(h) (1958). This application was denied by the Respondent and when the Plaintiff was taken into custody, for purposes of deportation, the Writ of Habeas Corpus was issued and a request for a stay of deportation was made on the grounds that the acts of the Respondent were null and void and that the deportation of the Plaintiff be stayed pursuant to Section 243(H).

On May 27, 1951 the Honorable William Herlands dismissed the Petition for a Writ of Habeas Corpus. The Petitioner filed a Notice of Appeal and moved, in the United States Court of Appeals for the Second Circuit, for an order temporarily staying deportation pending the determination of an appeal to that Court. During the argument before the United States Court of Appeals for the Second Circuit, on the Motion for a Stay, the Court denied said stay and dismissed the appeal.

Questions Presented

1) Have the requirements of procedural due process been met where there is a fusion of the prosecuting and the judicial functions in the Special Inquiry Officer?

2) Has there not been an abuse of administrative discretion where individauls applying for substantially the same relief and making basically the same *prima facie* showing are treated differently?

3) Is not the denial of an application pursuant to Section 243 (H) of the Immigration and Nationality Act

of 1952, improper where such denial rests solely upon the contention that the applicant failed to sustain the burden of showing physical persecution?

4) Did not the Court below err in affirming the dismissal of the Petition where material and substantial questions of both law and fact are involved?

5) Did not the Court below err in dismissing the Petitioners' appeal during the argument on a Motion for a Stay of Deportation pending the determination of such appeal?

Why Certiorari Should Be Granted

Certiorari is sought so that this Court may determine and settle the question as to the propriety of the procedure and the latitude of administrative discretion permissible in the administration of Section 243 (H) of the Immigration and Nationality Act of 1952, as amended.

It is respectfully submitted that very important questions of Federal Law are presented here which should be determined by this Court as early as possible. The Section of the Immigration and Nationality Act involved herein is the sole means by which aliens in the United States may seek political asylum, and escape physical persecution because of their political and or religious ideologies. Hence, the administration of this portion of our law affects, not only your Petitioner, but all of the thousands of aliens in the United States who are natives of the Communist dominated areas of the world.

Notwithstanding the fact that a stay of deportation, pursuant to said Section 243 (H), lies within the discretion of the Attorney General, such administrative dis-

cretion is not wholly exempt from judicial scrutiny, see *United States ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (2d Cir. 1954).

In the instant case, the Respondent argues that the question involved requires a decision as to foreign policy, traditionally left to the Executive Branch of the Government. The United States Congress, and the Department of Justice have both held that anti-Communist Roman Catholics have a sound basis for their fear of physical persecution upon their return to Yugoslavia. The United States Department of Justice approved and favorably recommended to the Congress, which in turn, by resolution, granted applications of Yugoslavian anti-Communist Roman Catholics for adjustment of their Immigration status pursuant to Section 6 of the Refugee Relief Act of 1953 (The Act of August 7, 1953; 67 Stat. 403), which Act provided in part as follows:

> "Sec. 6. Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that because of events which have occurred subsequent to his entry into the United States he is unable to return to the country of his birth, or nationality, or last residence, because of persecution or fear of persecution on account of race, religion, or political opinion, may, within one year after the effective date of this Act, apply to the Attorney General of the United States for an adjustment of his immigration status. * * *"

This policy was reaffirmed and has continuously been adhered to by both the United States Department of State and the Department of Justice. This is evidenced by the fact that applications, pursuant to Section 15 (A)(3)(c) of Public Law 85-316 (The Act of September

11, 1957; 71 Stat. 643), submitted to the Immigration and Naturalization Service, a branch of the Department of Justice have been approved; and in connection therewith, the Department of State has actually issued visas for permanent residence to Yugoslavian anti-Communist Roman Catholics pursuant to said Section 15(A)(3)(c), which Section provides as follows:

> "(c) (1) For purposes of subsection (a), the term 'refugee-escapee' means any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion. * * * "

It is clear, therefore, that the foreign policy of the United States in regards to Yugoslavia would not be affected by the Respondent's approval of the application submitted by the Petitioner herein. Quite to the contrary, the denial of the Petitioner's application disregards and is in contravention of our Government's stated policy.

The Respondent, in denying the application submitted by the Petitioner, contended that Petitioner did not sustain the burden of showing physical persecution. A denial on this basis is improper. There must be a positive finding of *no persecution* as a condition precedent to deportation. See, *Chen Ping Zee* v. *Shaugnessy*, 107 Fed. Supp. 607; *Harrisiades* v. *Shaugnessy*, 187 Fed. 2d 137.

It is obvious, therefore, that the Respondent is guilty of an arbitrary and capricious exercise of administrative discretion. Yugoslavian anti-Communist Roman Catholics

have been granted administrative relief because of fear of physical persecution as a result of their religious and or political beliefs. Yet, the Petitioner herein, who is likewise a Yugoslavian anti-Communist Roman Catholic has been denied administrative relief requested because of the same fears.

In addition to the abuse of administrative discretion, as set forth hereinabove, we are also confronted with an abuse of procedural due process. The Respondent has adopted a procedure whereby one individual acts as both a prosecuting and a judicial officer at one and the same time. The Special Inquiry Officer asks a question, and in the event of an objection thereto, proceeds to rule upon such objection. Further, he rules as to the propriety of any question posed by the applicant or his counsel, as well as to the relevance of any evidentiary matter presented for submission.

The present procedure theoretically provides for the Special Inquiry Officer to act as a fact gathering agent. He is to submit all of the evidence obtained to the Regional Commissioner. The Regional Commissioner, exercising the authority delegated to him by the Attorney General of the United States, then rules upon the application. In practice, the onus is placed on the applicant, or his attorney, to produce all evidence in support of the application. The Special Inquiry Officer adopts the attitude and position of a prosecutor whose every question is posed as a challenge to the credibility of the applicant and the merit of the application.

Special Inquiry Officers were charged with conducting hearings accorded to aliens making application pursuant to Section 6 of the Refugee Relief Act of 1953, as set forth above. They must, therefore, have been aware of applications, pursuant to said Act, made by and granted to

Yugoslavian anti-Communist Roman Catholics. Similarly, they must have had knowledge of the evidence submitted by such applicants to substantiate their fear of physical persecution because of their religious and or political beliefs.

Despite the fact that the Special Inquiry Officer is supposedly functioning here as an impartial fact gathering agent; and though it has been shown hereinabove that evidence in favor of Petitioner's application was readily available to him, the only evidence forwarded to the Regional Commissioner was that evidence introduced by the Petitioner himself.

Thus, though in theory the procedure involved may appear to be fair and just, in fact, and in practice it is quite different.

Finally, the United States Court of Appeals for the Second Circuit committed a reversible error in dismissing Petitioner's appeal at the termination of the oral argument, before said Court, for a temporary stay of deportation pending such appeal, when the application for said stay was the only issue then presented to the court.

The Petitioner had acted timely in filing its Notice of Appeal. The statutory period allowed for the docketing of the Appeal had not expired. Petitioner had not docketed the appeal prior to the time of the Court's dismissal of same. The case on appeal technically, therefore, was not yet before the Court. Hence, the dismissal could not have been made on the merits of the case on appeal as the Court had not yet acquired jurisdiction for such purpose.

Since the Petitioner had acted properly in all procedural matters regarding the appeal; and since the appeal involved substantial questions of both law and fact it was not procedurally defective.

Though terminated prior to being procedurally completed the Appeal was procedurally correct and therefore the case on appeal was not yet before the Court for consideration on the merits. The dismissal of the Appeal must, therefore, be held improper.

WHEREFORE, in consideration of the magnitude of the questions presented and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York, July 22, 1960.

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Respectfully submitted,

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